BERNARD FOON & ORS. v. PUBLIC PROSECUTOR

[F.C. (Azmi C.J. (Malaya), Pike C.J. (Borneo) & MacIntyre F.J.) June 17, 1968]

[K.L. — Federal Court Criminal Appeal No. X7 of 1968]

Criminal Law and Procedure — Kidnapping — Robbery — Common intention to commit — Kidnapping Act, 1961, s. 3(1) and Penal Code, s. 34.

The appellants were convicted of abducting a boy with intent to hold him for ransom in pursuance of a common intention punishable under section 3(1) of the Kidnapping Act, 1961, read with section 34 of the Penal Code. On appeal it was contended that (a) the learned trial judge was wrong in law in failing to consider that although the boy himself was incapable of giving his consent, the circumstances indicated that consent was granted by the father of the child and (b) although there was a common intention to commit robbery there was no common intention in respect of kidnapping.

Held: (1) the first submission ignored the circumstances of fear induced by the three appellants. These circumstances of fear deprived the consent or any voluntariness;

(2) the 2nd and 3rd appellants who remained in the room while the 1st appellant was demanding $5,000 or the son were giving mute aid to the 1st appellant in his demands and later remained in the house on guard for a sufficient time for the 1st appellant to abduct and take away the child. All this evidence was sufficient to justify an inference that there was common intention.

FEDERAL COURT.

Peter Yeoh for the 1st appellant.

D. R. Seenivasagam for the 2nd & 3rd appellants.

K. Somasundram (Deputy Public Prosecutor) for the respondent.

The judgment of the Federal Court was delivered by:—

Azmi C.J. (Malaya): The appellants were convicted of abducting a boy Tan Boon Teik with intent to hold him for ransom in pursuance of a common intention, punishable under section 3(1) of the Kidnapping Act, 1961 read with section 34 of the Penal Code.

Mr. Peter Yeoh for the first appellant submitted that the learned trial judge was wrong in law in failing to consider that although the boy was himself incapable of giving his consent, the circumstances set out indicated that consent was granted by the father of the child. In support of his argument he read to us the evidence of the father of the child at page 8 of the record where he said that he offered the younger child to be taken away because the elder one had to go to school the next day. Having offered the child there was therefore consent. But this ignores the circumstances of fear induced by the three appellants. These circumstances of fear cannot be ignored and deprived the consent or any voluntariness.

This ground must fail, and the first appellant's appeal must be dismissed.

Mr. Seenivasagam on behalf of the 2nd and 3rd appellants conceded that there was common intention in respect of the offence of robbery but submitted there was no common intention in respect of kidnapping. He bases his argument purely on the fact that the talking and acting was done by the appellant No. 1 only. He has overlooked the fact that the talking and acting was done in the presence of the other two appellants who later assisted in carrying out the kidnapping.

In considering the case of these two appellants regard must be had to what happened before and the disappointment of the two appellants at having found so little worthy of theft in the house and having complained to the first appellant about this. The 2nd and 3rd appellants then remained in the room while the first appellant was demanding $5,000 or the son, thereby giving mute aid to the first appellant in his demands and later remained in the house on guard for a sufficient time for the first appellant to abduct and take away the son without fear of a report being made to the police immediately. It should also be remembered that nothing was said in the house as to where the child was to be taken yet all foregathered at the place where he was taken later in the early hours of the next morning. And there was evidence as against the 3rd appellant of taking part in the receipt of the ransom money. All this evidence is in our view sufficient to justify an inference that there was common intention.

The appeal by the 2nd and 3rd appellants is also dismissed.

Appeals dismissed.

Solicitors: *Heng, Chen & Co.; S. Seenivasagam & Sons.*

VEERIAH v. NAL SINGH

[A.C.J. (Chang Min Tat J.) June 17, 1968]
[Ipoh — Civil Appeal No. 17 of 1967]

Landlord and Tenant — Controlled premises — One year's notice terminating tenancy under s. 12(1)(f) — Whether further notice necessary under s. 12(4) — Whether s. 12(4) superfluous — Whether the sections are in conflict — Control of Rent Ordinances, 1956, ss. 12(1)(f) and 12(4).

Where a landlord applies for possession of premises under section 12(1)(f) of the Control of Rent Ordinance, there is no necessity to give a further notice under section 12(4) in addition to the one year's notice given under section 12(1)(f). The giving of the one year's notice is sufficient compliance with both subsections.

Further there was no conflict between the requirement of one year's notice under section 12(1)(f) and section 12(4) but if the court was wrong in seeing no no superfluity in section 12(4) with regard to the one year's notice in section 12(1)(f), then the proper construction was to consider in so far as section 12(1)

(f) was concerned that section 12(4) was retained *ex abundanti cautela* for the sake of clarity and to avoid uncertainty.

Cases referred to:—

(1) *Queen* v. *County Council of Norfolk* [1891] 60 L.J.Q.B.D. 379, 380.

(2) *Green* v. *Marsh* [1892] 2 Q.B. 330.

(3) *Lawrence & Sons* v. *Willcocks* [1892] 1 Q.B. 696.

(4) *The King* v. *Commanding Officer, 30th Battalion Middlesex Regiment, Ex Parte Freyberger* [1917] 2 Q.B. 129.

(5) *The King* v. *The Westminster Unions Assessment Committee* [1917] 1 K.B. 832.

(6) *Ditcher* v. *Denison* (1857), 11 Moore 324; 14 E.R. 718, 723.

(7) *Cowper-Essex* v. *The Local Board of Acton* (1889), 14 App. Cas. 153, 169.

(8) *Dean* v. *Wiesengrund* [1955] 2 Q.B. 120.

(9) *Tye Lee Oil Mill & Anor.* v. *Ng Ok Ling* [1967] 1 M.L.J. 285.

CIVIL APPEAL.

P. P. Dharmananda for the appellant.

F. C. Arulanandom for the respondent.

Cur. Adv. Vult.

Chang Min Tat J.: This is an appeal by the tenant against the order made by the learned president, Sessions Court, Ipoh, for possession of premises No. 46 Connolly Road, Ipoh, to be given to the landlord. The landlord's application for possession of the premises which he had bought on 21st September 1963 was grounded on section 12(1)(f) of the Control of Rent Ordinance No. 2 of 1956 and in compliance with the requirements of that sub-section, he had by notice dated 4th March 1965 and served on the tenant on the same day, given notice to quit and deliver vacant possession on the 31st March 1966. No other notice was served.

At the trial and at the appeal before me, it was contended by counsel for the tenant that while the said notice did give not less than one year's notice to quit and was sufficient compliance with the requirements of section 12(1)(f), the tenancy had nevertheless not been terminated to enable the landlord to come to court and ask for an order for possession since under section 12(4), which reads as follows:—

"Except in the case of paragraph (e) of sub-section (1) of this section, nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law."

the landlord was under an obligation to determine the tenancy by a further notice of determination. It was admitted that the said notice of 4th March 1965 had the effect of determining the tenancy but it was urged that by reason of section 12(4) what had happened was in law deemed not to have happened. In other words, the notice of 4th March 1965 did not determine the tenancy for the purposes of section 12(4) and the landlord was not properly before the court and could not ask for an order for possession.

A good deal of case law on the meaning and application of the word "deem" occurring in other legislations was cited to me. No authority directly in point on the Control of Rent Ordinance however has been uncovered to support the ingenious proposition made before me. As far as the authorities cited to me are concerned, they all clearly hold that a thing is deemed to be something which it is not. Thus in *Queen* v. *County Council of Norfolk* (1) Cave J. in dealing with section 14 of the Highway & Locomotives Act 1878 (41 & 42 Vict. Ch. 77) said:—

"Section 14 says this: 'The following areas shall be deemed to be highway areas for the purposes of this Act.' Of course that language, it is quite plain, is slightly loose; because, generally speaking, when you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather an admission that it is not which it is to be deemed to be, and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing."

Green v. *March* (2) is a case on the English Bills of Sale Act and as pointed out therein, an instrument which was not a bill of sale was to be deemed to be a bill of sale and treated as one for the purpose of registration. In *Lawrence & Sons* v. *Willcocks,*(3) it was held that a writ of summons in an action on a bill of exchange with an endorsement for expenses for nothing and for interest was a specially indorsed writ within O. 3 r. 6 R.S.C. by reason of section 57 Bills of Exchange Act 1882 which declares that such expenses and interest shall be deemed to be liquidated damages. In *The King* v. *Commanding Officer, 30th Battalion Middlesex Regiment ex parte, Freyberger,*(4) the Court of Appeal held that even if a natural born British subject who was also a subject of an enemy state was entitled in time of war to make a declaration of alienage, he was nevertheless not entitled to be discharged from the army since he was "deemed to have been duly enlisted for the period of the war". In *The King* v. *The Westminster Unions Assessment Committee,*(5) the sentence "deemed to have been served and received" in section 65 of the Valuation (Metropolis) Act 1869 came to be construed, and it was held by Viscount Reading C.J., and Lush J., that delivery to the post office of a letter containing a notice properly addressed and prepaid as directed by section 65 raised a presumption that the notice had been received by the addressee and that this was not merely a presumption of fact until the contrary was shown but it was a presumption of law which could not be rebutted by showing that in fact the notice had not been received. In all these authorities cited, the one thread that runs through them is the statutory provision that a thing is deemed to be something

when in fact it is not. But not one of them, as far as I can see, can be said to found any proposition that a thing is deemed to impose or comply with a duty or an obligation or a necessary course of action when and if in fact that thing has by its nature and effect discharged that duty or obligation or effected that course of action. In other words, the argument of counsel for the tenant would be correct if and only if the statutory provision was something to the effect that "Nothing in this section shall be deemed to be a notice determining the tenancy." If there had been such words or words to that effect, then I would have no hesitation in agreeing with him that the notice of 4th March 1965 though a notice determining the tenancy with a year's notice was not a notice determining the tenancy for the purposes of the Ordinance. But that was not what section 12(4) says. What it says and, in my view, says plainly is that nothing shall relieve the landlord from the necessity of determining the tenancy according to the law, and it seems to me that so long as the landlord has determined the tenancy and could bring his action within one of the grounds allowed him in section 12(1), he could go before the court and ask for possession. And if his application falls within section 12(1)(f), he need not give a further notice additional to the one year's notice required. He has discharged his obligation to determine the tenancy.

Now it is settled law, as I understand it, that while a notice for a shorter period than the contractual period of tenancy is not effective to determine the tenancy, there is nothing to prevent the landlord from giving a longer notice than contractually required. This being so, I see no conflict between the year's notice required under section 12(1)(f) and the notice according to the law under section 12(4), or the need for a further notice, as submitted, by the provision of section 12(4).

For myself, I can see no violence to any accepted rules of interpretation or to the language of the Ordinance in the view I hold of the effect and meaning of section 12(4). The interpretation sought to be placed on section 12(4) by counsel for the tenant was based on the argument that to hold otherwise would be to render section 12(4) mere surplusage. I do not think that it does, since I see no conflict between the year's notice required under section 12(1)(f) and the notice in section 12(4) but if I am wrong in so holding, it is clear that the rule of interpretation against surplusage is not an absolute rule making it incumbent on the court to give meaning to every single word in an Act of Parliament. (See *Ditcher* v. *Denison* [6] and *Cowper-Essex* v. *The Local Board of Acton* [7]). When the necessity arises or there is some reason, then the court should not refuse to treat any phrase or sentence as superfluous or tautologous.

It may be that section 12(4) is superflous insofar as section 12(1)(f) is concerned. It was when it first appeared as section 13(3) of the 1948 Control of Rent Ordinance patently so in the case where a tenant gave up his tenancy under section 13(1)(e) of the 1948 Ordinance and the absurdity had to be remedied by statutory provision in F.M. Ordinance No. 61 of 1949. It could be argued that no amendment had been made with reference to section 12(1)(f) because it was the manifest intention of the legislature to require this further notice but as I have said earlier, such an argument involves re-writing an enactment. Of the two courses, by accepted canons of interpretation, it is permitted to treat a section or certain words as superfluous but never to re-write the words of an enactment. For myself, if I am wrong in seeing no superfluity in section 12(4) with regard to the one year's notice in section 12(1)(f), I prefer, as being in my view the more proper construction, to consider that insofar as section 12(1)(f) is concerned, section 12(4) has been retained *ex abundanti cautela* or for the sake of clarity, and to avoid uncertainty as certain words in the English Rent Restriction Act were regarded in *Dean* v. *Wiesengrund* [8] cited in *Tye Lee Oil Mill & Anor.* v. *Ng Ok Ling.* [9]

Accordingly I held that there is no necessity to give a further notice under section 12(4) in addition to the one year's notice given under section 12(1)(f) and that the giving of the notice of 4th March 1965 was a sufficient compliance with section 12(1)(f) and section 12(4) of the Ordinance.

The second ground of appeal is, in a few words, that the learned president was wrong on the evidence in holding that greater hardship would be caused by refusing to grant the order than by granting it.

Now what was this evidence. The landlord had living with him in a rented house, No. 9 Jelf Road, his three daughters, all grown up, and two sons. The three daughters occupied the two small bedrooms on the first floor whilst he and his two sons slept on the ground floor. In the day time, he conducted his moneylending business on the ground floor. As against this, the tenant, unemployed except for occasional periods when he undertook to supply wedding cakes, had two wives, six children and three grand-children. Of his children, his second son aged 27, not married, was working for the National Electricity Board. The tenant did not allege that this son stayed with him. He did, however, say that his third son, Ganeson, aged 21 years, unemployed, stayed with him. Another son, an adopted son, was clearly the subject of lies on the part of the tenant who was forced to admit later that this adopted son stayed in municipal quarters. A fourth son, Krishnan, worked also for the municipality. The tenant alleged that this son lived

with him. There was no evidence of the residence of the fifth who would be the last son, if the adopted son was included in the count. The tenant further alleged that one of his sons was married and his wife and their children lived with him. There is no allegation that this married son who could only be the eldest son, lived with the tenant and in the absence of such evidence, or of any explanation, it must be taken as another falsehood. Who lived with the tenant at the premises in dispute was not clear on the evidence, but his evidence was led by experienced counsel. A court in an assessment of the evidence must necessarily pay regard to the words used in their ordinary meanings and if no allegation was made by *X* who wants the court to believe that *Y* resided with him, then it must be taken that *Y* did not reside with *X*. From the evidence, if the tenant was to be believed, it would appear that the tenant had residing with him his two wives, and two sons Ganesan and Krishnan, and of these two Krishnan was entitled to municipal quarters.

It was, as I have said, not clear in evidence whether the eldest son lived with him. Not one word was said. All that was led in evidence was that he was doing business as an agent of Singer Sewing Machine Co. Ltd., on the premises but as pointed out by the learned president to counsel for the landlord during the cross-examination of the tenant, there was no allegation in the pleadings that the tenant or his son was carrying on business on the premises as a ground for resisting the application, despite the fact that when the action was commenced, if not when the notice of 4th March 1965 was served, the tenant, if he was to be believed, had already allowed his eldest son to conduct his business on the premises. It therefore appears to me that the learned president was right to ignore this allegation in his assessment of hardship, but if he was wrong, I do not think that it was of any great relevance. Agencies for Singer Sewing Machine Co. Ltd., are dotted all over the country and extend even to remote kampongs. Their success depended not on a strategic location but on the need of almost every family in the land for a sewing machine. It is also in evidence that previous to the son's business, the tenant had let out the ground floor to a Chinese laundry man who left in 1965. Even if the tenant was to be believed that he did not put his son in place of the laundry man purposefully to defeat the application of the landlord, the point is that the whole of this evidence clearly established that the tenant did not need the accommodation of the entire premises for his living and such of his family as resided with him, and that there would be no hardship in the son removing his agency to another premises in the locality.

It is in evidence that the landlord had offered to arrange with his own landlord for the exchange of premises with the tenant. This offer was rejected by the tenant on the ground that it was not suitable. It is also in evidence that the landlord had also offered by way of alternative accommodation one or two of his houses in Silibin Lane, each with two rooms, which were then vacant. This offer was also turned down. The attitude of the tenant can only be described, if one is inclined to be charitable, as that of a dog in the manger and his counsel had openly and quite rightly not sought to throw any moral mantle over him. The evidence however suggested that the tenant's resistance was for the purpose of exacting 'tea-money'.

As for the landlord, he alleged that he required the premises in Connolly Road, Ipoh, for his moneylending business. Any premises in a side road such as Jelf Road or Silibin Lane would not give the security which premises on a major road such as Connolly Road could give, and which the business requires. The question of installing modern sanitation was only a side issue, but in all the circumstances the learned president found that the application by the landlord was a genuine one.

Now all this evidence was before the learned president. He had the advantage of seeing and hearing the witnesses. He had the further advantage of visiting the premises and the locality. He had come to certain findings of fact and inferences drawn from the facts he had found. On the whole of the evidence he had come to the conclusion that greater hardship would be inflicted by refusing to grant the order than by granting it. I am unable to see nor has it been demonstrated to me that on the evidence before him, and in all the circumstances of the case, he could not come to his findings of fact or how his inferences were wrongly drawn. Neither has it been shown to me that his very careful reasoning and consideration of the relevant authorities were wrong.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

Solicitors: *Dharmananda & Co.; Arulanandom & Co.*

SUBBIAH SUNDARAVALLI ACHI v. KARUPPIAH CHETTIAR & ANOR.

[O.C.J. (Chang Min Tat J.) June 17, 1968]
[Ipoh — Originating Summons No. 149 of 1968]

Wills — Testator disposing of properties to widow during life time — Whether resulting trust created — Presumption of advancement — Evidence in rebuttal.

Executors and Trustees — Testamentary remuneration — Whether trustees entitled to salary for running business on behalf of testator's estate.

The applicant was the younger of the two widows of the testator and one of the beneficiaries of his estate.